

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALICIA OROZCO MICHEL,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

Civil No. 09-cv-2214-JLS (POR)

**REPORT AND RECOMMENDATION
GRANTING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT,
DENYING DEFENDANT'S CROSS
MOTION FOR SUMMARY
JUDGMENT, AND REMANDING FOR
FURTHER PROCEEDINGS**

[Document No. 14]

[Document No. 15]

I. INTRODUCTION

On October 7, 2009, Plaintiff Alicia Orozco Michel ("Plaintiff") filed a complaint pursuant to section 405(g) of the Social Security Act ("SSA") requesting judicial review of the final decision of the Commissioner of the Social Security Administration ("Commissioner" or "Defendant") regarding the denial of Plaintiff's claim for disability insurance and supplemental security income benefits. (Doc. 1.) On April 30, 2010, Defendant filed an answer (Doc. 8) and the Administrative Record (Doc. 10).¹ On August 28, 2010, Plaintiff filed a motion for summary judgment regarding her 405(g) claim. (Doc. 14.) Plaintiff contends the Administrative Law Judge ("ALJ") failed to properly consider all of the available relevant medical evidence. (Doc. 14-1 at 8-11.) On September 27, 2010, Defendant filed a cross-motion for summary judgment and opposition to Plaintiff's motion

¹Administrative Record, hereinafter "AR."

1 for summary judgment. (Doc. 15.)

2 The Court finds the motions appropriate for submission on the papers and without oral
3 argument pursuant to Local Rule 7.1(d)(1). (See Doc. 13.) For the reasons set forth herein, the
4 Court RECOMMENDS granting Plaintiff's Motion for Summary Judgment, denying Defendant's
5 Cross Motion for Summary Judgment, and remanding for further proceedings.

6 **II. PROCEDURAL BACKGROUND**

7 On July 26, 2006, Plaintiff filed an initial application for Disability Insurance Benefits and
8 Supplemental Security Income. (AR 7, 47-50.) In both applications, Plaintiff alleged a disability
9 beginning on July 25, 2006. (Id.) After a January 4, 2007 denial at the initial determination (AR 51-
10 55) and a July 26, 2007, denial on reconsideration (AR 60-64), Plaintiff filed a timely request for
11 hearing before an administrative law judge (hereinafter "ALJ") on September 25, 2007. (AR 68.)
12 On May 28, 2009, Plaintiff testified at an administrative hearing before an ALJ. (AR 22-46.) She
13 was represented by Elise Kellman, Esq. (AR 22.) Dr. Sydney Bolter, a medical expert, and John
14 Kilcher, a vocational expert, also testified at the hearing. (AR 22; 34-46.) On June 19, 2009, the
15 ALJ denied Plaintiff benefits. (AR 7-16.) The decision of the Social Security Administration
16 (hereinafter "SSA") became final when the Appeals Council adopted the ALJ's findings by decision
17 dated August 14, 2009. (AR 1-3.) Thereafter, Plaintiff filed the instant action in Federal Court on
18 October 7, 2009. (Doc. 1.)

19 **III. FACTUAL BACKGROUND**

20 Plaintiff was born on November 2, 1977 in Guadalajara, Mexico. (AR 25; 276-77) At ten
21 years old, Plaintiff sustained a traumatic brain injury with multiple periorbital fractures when her
22 aunt's car was struck by another vehicle. (AR 25-27; 244-48.) Plaintiff was treated at the Rancho
23 Los Amigos Medical Center in Los Angeles, California, where she remained in a coma for more
24 than two weeks. (AR 26; 244.) Several months after the accident, Plaintiff had surgery to repair her
25 orbital fractures. (AR 26; 276-77.) Plaintiff underwent months of rehabilitation, but as a result of
26 her injury, she claims to suffer from moderate memory loss, a statistically significant difference
27 between her performance and verbal IQ, as well as migraine headaches that occur four to five times
28 a week and often last for days at a time. (AR 23-24; 28; 277.)

1 Plaintiff graduated from high school with below average grades and completed some courses
2 at a community college. (AR 23.) From July, 2000 to August, 2006, Plaintiff held a series of
3 temporary, part-time jobs, including receptionist, cashier, apartment manager and childcare worker.
4 (AR 165-172.) For instance, Plaintiff claims she had significant difficulty remembering instructions
5 and learning what to do on the job. (AR 281.) However, until 2006, Plaintiff was unaware that her
6 symptoms were related to the car accident, which is why Plaintiff has stated her onset of disability is
7 July 25, 2006. (AR 29-30; 281.) At the time of her hearing, Plaintiff was enrolled at the Acquired
8 Brain Injury Program at Mesa College to learn strategies for coping with her cognitive impairments.
9 (Id.)

10 **1. Medical Evidence**

11 **a. Treating Physician Evidence**

12 On February 18, 2006, Plaintiff sought treatment from Dr. Erik Fenton Perkins for severe
13 migraines, which occurred two to three times a week and were often associated with photophobia
14 and nausea. (AR 303-05.)

15 On May 5, 2006, Plaintiff was referred to Dr. Barbara Schrock for a neuropsychological
16 evaluation at the Sharp Rehabilitation Services' Psychology Department. (AR 294.) Dr. Schrock
17 reviewed Plaintiff's medical records from the Rancho Los Amigos Medical Center's Pediatric Brain
18 Injury Clinic. (AR 294-95.) Plaintiff's medical records from the time of the accident indicated she
19 sustained a brain injury, as well as multiple periobital fractures. (AR 294.) A head CT scan
20 performed on December 18, 1987 read as normal. (Id.) After surgery to repair orbital fractures on
21 February 4, 1988, Plaintiff received rehabilitation services at Rancho Los Amigos for several
22 months. (AR 294-95.)

23 During the evaluation, Plaintiff reported she has continued to have frontal headaches at least
24 four times a week since her accident. (AR 295.) At times, her headaches have been accompanied
25 by vomiting and can be so severe that she is awoken from sleep. (Id.) Also, during the evaluation it
26 was noted Plaintiff was alert and cooperative, hygiene and grooming were appropriate, and her
27 speech was spontaneous and fluent. There was no evidence of aphasia, dysarthria, or dysnomia. Her
28 affect was appropriate with no observable evidence of anxiety or depression and no evidence of a

1 formal thought disorder. Plaintiff appeared to understand all test instruction and effort appeared to
2 be maximal. (Id.)

3 Testing revealed simple motor speed was in the average range bilaterally, fine motor
4 coordination was in the average range bilaterally, and uni-manual and bi-manual coordination was
5 within normal limits bilaterally with no evidence of ideometer, buccofacial or ideational apraxia.
6 (AR 295.) Additionally, there was no evidence of motor disinhibition or motor preservation. (Id.)
7 Dr. Schrock observed no evidence of apasia, dysarthria, or dysnomia. (Id. at 296.) Dr. Schrock
8 reported Plaintiff's affect was appropriate and there was no evidence of a formal thought disorder.
9 (Id.)

10 Plaintiff achieved the following IQ scores on the Wechsler Adult Intelligence Scale-III:
11 verbal IQ of 77, performance IQ of 98, and a full scale IQ of 85. (AR 298.) Dr. Schrock found that
12 the twenty-one point discrepancy between Plaintiff's verbal and performance IQ scores to be
13 statistically significant. (Id.) The neuropsychological defects noted in Plaintiff's profile included
14 mildly impaired verbal reasoning skills, mildly impaired working memory, significantly and
15 diffusely impaired learning and memory, and impaired ability to shift mental set. (AR 299.) Dr.
16 Schrock found evidence that Plaintiff's current verbal IQ was significantly lower than pre-morbid
17 estimates, suggesting the injury had a greater effect on the left hemisphere of her brain. (Id.) While
18 the interpretation of Plaintiff's verbal tests was somewhat complicated by her being bilingual, Dr.
19 Schrock found that the degree of discrepancy between Plaintiff's verbal and performance IQ scores
20 did not reflect bilingual factors only. (AR 299-300.) Rather, Dr. Schrock found the fact that
21 memory was diffusely impaired consistent with a history of significant brain injury. (AR 300.)

22 Dr. Schrock concluded these test results would have implications on Plaintiff's daily life, as
23 well as her ability to maintain employment. (AR 300.) In regards to her headaches, Dr. Schrock
24 found stress and tension may have contributed to their severity. (Id.) She noted Plaintiff admitted to
25 significant difficulties remembering instructions and learning what to do on the job. (Id.) Dr.
26 Schrock found Plaintiff's failures in higher education consistent with these test results. (Id.) Based
27 on her test results, Dr. Schrock believed Plaintiff should be considered a disabled student if she
28 elected to continue her education. (Id.) Because Plaintiff was clearly unaware of the degree of

1 impact her childhood injury would have on her current life, Dr. Schrock opined that Plaintiff would
 2 benefit from rehabilitation, speech therapy, and a course to assist her in developing practical
 3 strategies for understanding and coping with her strengths and weaknesses. (Id.)

4 From July 31, 2006 to February 22, 2007, Plaintiff sought treatment from Dr. E. B.
 5 Friedman, a specialist in adult neurology and psychiatry. (AR 343-49.) Plaintiff claimed to have
 6 problems with her memory since the injury; however, she believed her symptoms were getting
 7 worse. (AR 347-48.) She also reported signs of depression. (AR 343-48.) Dr. Friedman proscribed
 8 Plaintiff various doses of Effexor, Topomax and Imitrex to treat her posttraumatic migraine
 9 headaches. (AR 343-46.) He noted Plaintiff also took Excedrin to control the pain. (AR 344.)

10 In 2006, Plaintiff was also referred to Dr. Boris Khamishon, a neurologist.² (AR 219; 224.)
 11 Plaintiff reported taking Topamax for headaches, but reported she continued to have severe
 12 headaches up to four times a week that would last up to twenty-four hours. (Id.) She claimed her
 13 headaches were accompanied by photophobia and phonophobia, but no nausea or vomiting. (Id.)
 14 Plaintiff also reported having two seizures within the past year and difficulty with memory. (AR
 15 409; 411.) Dr. Khamishon diagnosed Plaintiff with residual posttraumatic head syndrome. (AR
 16 411.) He proscribed Amitriptyline to help her sleep. (AR 224.)

17 From October, 2007 to August, 2008, Plaintiff was treated by Dr. Sultana N. Hamrang, a
 18 psychiatrist. (AR 219; 387-405.) Plaintiff reported having marital problems (AR 400), as well as
 19 anger, hopelessness and memory problems. (AR 400; 402.) Dr. Hamrang diagnosed Plaintiff with a
 20 major depressive disorder and proscribed various medications, including Prozac, to treat her
 21 condition. (AR 387-99; 404.)

22 At Dr. Khamishon's referral, Plaintiff received an MRI on February 6, 2009. (AR 406.) Dr.
 23 Louis Mass, the reading radiologist, found a mild nonspecific anterior frontal subcortical T2
 24 weighted signaled hyperintensity with some dropout on the right on the gradient echo sequence.
 25 (Id.) Dr. Maas determined these findings may have related to a previous brain contusion. (Id.) He
 26 noted old trauma may have also explained the minor band of gliosis seen in the splenium of the
 27

28 ² The Court notes Defendant disputes the characterization of Dr. Kamishon as a treating
 physician. This issue will be addressed below.

1 corpus callosum, a typical location for shearing injuries. (Id.) Dr. Maas concluded migraine
2 headaches may be associated with subcortical T2 hyperintensity, but do not explain the T2
3 hyperintensity. (Id.)

4 On May 26, 2009, Dr. Khamishon administered a residual functional capacity questionnaire.
5 (AR 413-422.) Dr. Khamishon recorded Plaintiff's prognosis as guarded. (AR 416.) He found that
6 while Plaintiff has a headache, she would generally be precluded from performing even basic work
7 activities. (Id.) He also found she would be able to tolerate moderate stress in her work
8 environment. (Id.) Dr. Khamishon estimated Plaintiff would be absent from work more than four
9 times a month as a result of her impairments. (AR 417.)

10 **b. Examining Physician Evidence**

11 On June 14, 2007, Plaintiff was examined by Dr. Kenneth Stover, a board certified
12 neurologist, at the request of the Department of Social Services Disability and Adult Programs. (AR
13 358-61.) Plaintiff complained of migraines and memory loss. (AR 358.) She also claimed to have
14 memory problems with simple activities and difficulty remembering directions. (AR 359.) Plaintiff
15 reported she was taking the following medications: Imitrex, Excedrin, Effexor, hydrocodone,
16 ibuprofen and Topamax. (AR 359.) Dr. Stover reviewed Dr. Schrock's medical records and her
17 notes on Plaintiff's medical history. (AR 358.) He noted Plaintiff's headaches are often precipitated
18 by stress and that Plaintiff had recently separated from her husband. (AR 359.)

19 Dr. Stover diagnosed Plaintiff with orbital fractures by history, migraine by history and
20 memory loss by history. (AR 361.) He indicated Plaintiff had signs and symptoms consistent with
21 migraine tension issues, a mild learning disorder and mild recent memory. (Id.) However, when
22 questioned more deeply about various memory intense issues, Dr. Stover found Plaintiff was able to
23 answer such questions satisfactorily. (Id.) From a neurologic standpoint, Dr. Stover concluded
24 Plaintiff had no manipulative limitations and was not restricted in standing, walking, lifting or
25 carrying. (Id.) However, if Plaintiff has an intense headache, he found it would be difficult for her
26 to perform many of these tasks with the accompanying pain. (Id.) Finally, Dr. Stover determined
27 Plaintiff's memory issues would be best assessed with psychometric testing. (Id.)

28 On July 23, 2007, Plaintiff was seen by Dr. Douglas Engelhorn for a psychiatric consultation

1 as part of her evaluation for Social Security disability. (AR 381-84.) Dr. Engelhorn reviewed
2 Plaintiff's medical and work history. (AR 381.) Plaintiff reported she was not taking any
3 medications at the time of the appointment, but that she expected to have her prescription for
4 Effexor refilled in the near future. (AR 382.) Plaintiff further reported she has had frequent
5 migraine headaches, often four to six per week. (Id.) She stated the headaches last anywhere from
6 several hours to a full day in duration and are often accompanied by nauseousness and sensitivity to
7 light. (Id.) Finally, Plaintiff also reported she had been struggling with depression for at least seven
8 years and was seen by a psychiatrist in early 2007. (Id.) She stated that much of her depression was
9 related to marital discord and felt Effexor minimized her symptoms of depression. (Id.)

10 Plaintiff stated she takes on many household tasks, including cooking, cleaning, child care,
11 laundry and grocery shopping, though usually in the company of a relative. (Id.) She claimed she
12 was capable of driving a car and attended church regularly. (Id.) Based thereon, Dr. Engelhorn
13 found Plaintiff was capable of taking care of her basic needs. (Id.) During the evaluation, Plaintiff
14 appeared alert, cooperative and oriented in all spheres. (Id.) She was dressed appropriately and
15 appeared to be of average intelligence. (Id.) Dr. Engelhorn noted no evidence of psychosis, active
16 depression or significant levels of anxiety. There was no evidence of psychomotor retardation, flat
17 affect, loosening of associations, delusions or hallucinations. (AR 383.) Upon questioning, Dr.
18 Engelhorn noted Plaintiff's concentration and attention seemed unimpaired, though she had
19 difficulty at some points. (Id.)

20 He diagnosed Plaintiff with depressive disorder and concluded there was very minimal
21 impairment from her brain injury. (Id.) He assessed Plaintiff with a Global Assessment of
22 Functioning (GAF) score of 70. (Id.) Dr. Engelhorn found her daily activities were within normal
23 limits and noted Plaintiff was capable of driving to and from work. (Id.) He determined Plaintiff
24 was capable of performing simple, repetitive tasks, and could probably also perform complex and
25 detailed work. (Id.) As judged by her presentation at the appointment, Dr. Engelhorn found she
26 could adequately relate to peers and supervisors in the workplace and could be expected to make
27 routine adjustments on the job. (Id.) In sum, Dr. Engelhorn concluded there was no evidence of
28 cognitive impairment. (Id.)

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2 **2. The Hearing**

3 **a. Plaintiff's Testimony**

4 At the hearing, Plaintiff described the car accident and testified that she has suffered from
5 migraine headaches ever since. (AR 25-28.) She testified she has a migraine almost every day and
6 up to four or five times a week. (AR 28.) She reported taking Simatriptan and multiple doses of
7 Excedrin Migraine for the pain. (AR 28-29.) Plaintiff stated she lived with her parents and had no
8 social life apart from her family. (AR 31.)

9 Plaintiff testified that her migraines had significantly impaired her ability to maintain
10 competitive employment. If she felt the onset of a migraine at work, Plaintiff claimed she would
11 have to leave as soon as possible because it would be impossible to focus on her work or finish out
12 the day. (AR 29.) She also testified she had to leave her last position as a customer service
13 representative because she was often confused and unable to remember directions. (Id.) Though
14 Plaintiff had suffered from headaches and memory loss since the accident, she testified that she did
15 not realize her problems were related to her brain injury until 2006. (AR 30.) In response to
16 questioning from the ALJ, Plaintiff stated she could perform household tasks, such as washing
17 dishes or sweeping floors. (AR 31.) However, Plaintiff stated she would be unable to accept a job
18 performing such tasks because migraines would interrupt her ability to work on a regular basis. (AR
19 32.) Because she was unable to hold a steady job, Plaintiff testified she had enrolled at Mesa
20 College's Acquired Brain Injury Program to learn strategies to cope with her brain injury. (AR 23-
21 24; 33.) She hoped the program would give her the skills she needed to start over. (AR 34.)

22 **b. The Medical Expert's Testimony**

23 Medical expert Dr. Sydney Bolter, a board-certified psychiatrist, also testified at the hearing.
24 (AR 22; 34-45.) Dr. Bolter testified he had reviewed the file in the case and reviewed the new
25 evidence rather briefly. (AR 35.) Dr. Bolter did not review Dr. Hamrang's medical reports,
26 however, because he found them difficult to read. (Id.) Nevertheless, Dr. Bolter claimed he had
27 sufficient evidence to formulate an opinion as to Plaintiff's condition. (Id.)

28 Although Dr. Bolter did not examine Plaintiff, at the hearing, Dr. Bolter questioned Plaintiff

1 about her ability to interact with other students in her classes. (AR 35.) Plaintiff responded that she
2 did not talk to her peers at all because she had to focus to concentrate on her teacher. (AR 35-36.)
3 He also questioned Plaintiff regarding the medications she had been prescribed by various
4 physicians. (AR 37.) At the time of the hearing, Plaintiff testified she was taking Elavil, Topamaz,
5 Zoloft, Imitrex, and Amitriptylene for migraines and depression. (AR 37-38.)

6 Dr. Bolter testified there was conflicting evidence in the record regarding the severity of
7 Plaintiff's condition. (Id.) He stated that if one took Dr. Englehorn's report literally, it would
8 indicate Plaintiff could do almost anything. (AR 37.) Specifically, Dr. Bolter noted that Dr.
9 Englehorn's exam yielded no evidence of impaired memory. (AR 40.) Yet Dr. Bolter seemed to
10 agree with Dr. Schrock's assessment that the significant difference between Plaintiff's verbal and
11 performance IQ scores was statistically significant and could indicate a brain injury or damage to
12 mental involvement. (AR 38.) Dr. Schrock's exam also indicated Plaintiff had impaired problems
13 with working memory index, vocabulary and processing speed. (AR 40.) Dr. Bolter explained Dr.
14 Englehorn and Dr. Schrock had limited contact with Plaintiff, which could explain their conflicting
15 opinions. (Id.) However, Dr. Bolter concluded Dr. Englehorn's determination that Plaintiff could
16 do complex tasks was not supported anywhere else in the record. (AR 42.)

17 According to his review of Plaintiff's medical records, Dr. Bolter diagnosed Plaintiff with an
18 organic mental illness as a result of brain injury. (AR 40.) Though Plaintiff was unaware that her
19 brain injury would have an impact on her current life, Dr. Bolter did not find any evidence her
20 condition was getting worse. (AR 39.) At most, he found Plaintiff's daily activities would be
21 moderately limited by her condition, but her social functioning would be markedly limited. (AR 40-
22 41.) Dr. Bolter determined Plaintiff would be able to concentrate on very simple, repetitive tasks.
23 (AR 41.) In his opinion, Plaintiff's injury had caused memory impairment. (Id.) He believed
24 Plaintiff would function best in a low stress environment as it would be difficult for her to complete
25 even simple tasks if suffering from migraine headaches. (AR 42.)

26 **c. The Vocational Expert's Testimony**

27 Vocational expert John Kilcher testified briefly at Plaintiff's hearing. (AR 45-46.) He
28 characterized Plaintiff's past work was light level and semi-skilled. (AR 46.)

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2 **3. The ALJ's Findings**

3 After consideration of all the evidence, the ALJ concluded Plaintiff has not been under a
 4 disability, as defined by the SSA, from July 25, 2006 through the date of his decision. (AR 16.)
 5 Specifically, the ALJ concluded: (1) Plaintiff meets the insured status requirements of the SSA
 6 through December 31, 2011; (2) Plaintiff has not engaged in gainful activity since July 25, 2006, the
 7 alleged onset date; (3) Plaintiff suffers from the severe impairments of migraine headaches and
 8 memory loss, which cause significant limitation in Plaintiff's ability to perform basic work
 9 activities; (4) Plaintiff's mental impairment does not meet or medically equal one of the listed
 10 impairments in
 11 20 CFR Part 404, Subpart P, Appendix 1; (5) Plaintiff has the residual functional capacity³ to
 12 perform a full range of work at all exertional levels with non-exertional limitations, including she
 13 can understand, remember and carry out only simple, one or two-step instructions, she can relate and
 14 interact with supervisors, co-workers and the general public, she can maintain concentration and
 15 attention for simple, repetitive works, and she can tolerate a moderate level of job-related stress; (6)
 16 Plaintiff is unable to perform any past relevant work; (7) Plaintiff was born on November 2, 1977
 17 and was 28 years old, which is defined as a younger individual age 18-44, on the alleged disability
 18 onset date; (8) Plaintiff has at least a high school education and is able to communicate in English;
 19 (9) Transferability of job skills is not material to the determination of disability because using the
 20 Medical-Vocational Rules as a framework supports a finding that Plaintiff is "not disabled," whether
 21 or not Plaintiff has transferable job skills; and (10) There are jobs that exist in significant numbers in
 22 the national economy that Plaintiff can perform. (AR 9-16.)

23 The ALJ's findings reflect he considered opinion evidence, Plaintiff's symptoms, and the
 24 extent to which Plaintiff's symptoms were consistent with the objective medical evidence and other
 25 evidence. (AR 11-14.) In determining Plaintiff's RFC, the ALJ considered the opinions of Dr.
 26 Schrock, Dr. Stover, Dr. Engelhorn, and Dr. Bolter, as well as the results of an MRI scan taken of
 27 Plaintiff's brain on February 6, 2009. (AR 11-13.) The ALJ noted the following observations made

28 ³ Residual functional capacity, hereinafter "RFC."

1 by Dr. Schrock:

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3 During the evaluation it was noted [Plaintiff] was alert and cooperative, hygiene and
4 grooming were appropriate, and her speech was spontaneous and fluent. There was no
5 evidence of aphasia, dysarthria, or dysnomia. Her affect was appropriate with no observable
6 evidence of anxiety or depression and no evidence of a formal thought disorder. [Plaintiff]
7 appeared to understand all test instruction and effort appeared to be maximal. Testing
revealed simple motor speed was in the average range bilaterally, fine motor coordination
was in the average range bilaterally, and uni-manual and bi-manual coordination was within
normal limits bilaterally with no evidence of ideometer, buccofacial or ideational apraxia.
Additionally, there was no evidence of motor disinhibition or motor preservation.

8 (AR 11-12.) Further, the ALJ noted that according to the Wechsler Adult Intelligence Scale-III,
9 Plaintiff's verbal comprehension, expressive vocabulary, arithmetic performance and working
10 memory were only mildly impaired. (AR 12.) Plaintiff's sustained concentration in the visual
11 modality and processing speed were in the average range. (AR 12.)

12 With regard to Dr. Stover, the ALJ noted he reported Plaintiff had signs and symptoms
13 consistent with migraine tension complex issues and the psychometric testing was indicative of a
14 mild learning disorder and mild recent memory. (AR 12.) Further, the ALJ noted Dr. Stover
15 concluded Plaintiff "is not restricted in standing, walking, sitting, lifting, or carrying, pushing, or
16 pulling. Additionally, she is not restricted with any postural functions such as climbing, balancing,
17 stooping, kneeling, or crouching; and no manipulative limitations as to reaching, handling, or
18 fingering." (AR 12.)

19 With regard to Dr. Engelhorn, the ALJ considered his observations that Plaintiff was not
20 taking any medications and that although she alleged a seven year history of depression, she only
21 started receiving treatment a few months earlier, which could be related to marital discord. (AR 12.)
22 The ALJ also noted Dr. Engelhorn found there was no evidence of any psychosis, active depression
23 or significant levels of anxiety. (AR 12.) Further, the ALJ considered Dr. Engelhorn's diagnosis
24 that Plaintiff suffered from a depressive disorder and partner relational problems, and assessed her
25 Global Assessment of Functioning at 70, which suggests only mild symptoms. (AR 12.)

26 As to Dr. Bolter, the ALJ relied on his testimony that the evidence supported the diagnosis of
27 migraines and mild depression. (AR 13.) Further, Dr. Bolter opined that Plaintiff's memory
28 impairment would result in her experiencing a moderate restriction in activities of daily living,

1 marked difficulties in maintaining social functioning, and mild difficulties in maintaining
2 concentration, persistence and pace. (AR 13.) Based thereon, Dr. Bolter concluded it would be best
3 for Plaintiff to be limited to simple, repetitive tasks in a low key job that would not stress one with
4 migraines. (AR 13.)

5 Moreover, the ALJ found that to the extent it is alleged Plaintiff cannot work at the RFC as
6 recited above, “those allegations are not totally credible.” (AR 13.) The ALJ noted the following:
7 (1) Plaintiff’s activities of daily life did not indicate a disabling level of impairment of Plaintiff’s
8 RFC; (2) Dr. Schrock concluded Plaintiff revealed no evidence of aphasia, dysarthria, or dysnomia
9 and her affect was appropriate; (3) Dr. Schrock noted Plaintiff appeared to understand all test
10 instructions; (4) Dr. Engelhorn noted Plaintiff was not currently taking medications, which is not
11 consistent with someone who has a disabling level of impairment; (5) Plaintiff only started receiving
12 treatment for her depression a few months prior to seeing Dr. Engelhorn; (6) Plaintiff stated much of
13 her depression was related to marital discord; (7) Dr. Engelhorn found there was no evidence of any
14 psychosis, active depression or significant levels of anxiety; (8) No physician opined that listing
15 level limitations were ever met or equaled; and (9) the objective evidence of the claimant’s medical
16 record does not establish impairments likely to produce disabling pain or other limitations as alleged
17 for any period of 12 or more continuous months. (AR 13-14.)

18 IV. DISCUSSION

19 1. Legal Standard Regarding Review of Denial of Disability Claim

20 To qualify for disability benefits under the Social Security Act, applicants must show two
21 things: (1) They suffer from a medically determinable impairment that can be expected to last for a
22 continuous period of twelve months or more, or would result in death; and (2) the impairment
23 renders applicants incapable of performing the work they previously performed or any other
24 substantially gainful employment that exists in the national economy. See 42 U.S.C.A. §§
25 423(d)(1)(A), (2)(A) (West Supp. 2008). An applicant must meet both requirements to be classified
26 as “disabled.” Id.

27 Sections 205(g) and 1631(c)(3) of the Social Security Act allow applicants whose claims
28 have been denied by the SSA to seek judicial review of the Commissioner’s final agency decision.

42 U.S.C.A. §§ 405(g), 1383(c)(3) (West Supp. 2008). The Court should affirm the decision unless “it is based upon legal error or is not supported by substantial evidence.” Bayliss v. Barnhart, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1999)).

“Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support [the ALJ’s] conclusion[,]” considering the record as a whole. Webb v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005) (citing Richardson v. Perales, 402 U.S. 389, 401 (1971)). It means “more than a mere scintilla but less than a preponderance[]” of the evidence. Bayliss, 427 F.3d at 1214 n.1 (quoting Tidwell, 161 F.3d at 601). “[T]he court must consider both evidence that supports and the evidence that detracts from the ALJ’s conclusion” Frost v. Barnhart, 314 F.3d 359, 366-67 (9th Cir. 2002) (quoting Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985)).

To determine whether a claimant is “disabled,” the Social Security regulations use a five-step process outlined in 20 C.F.R. § 404.1520 (2008). If an applicant is found to be “disabled” or “not disabled” at any step, there is no need to proceed further. Ukolov v. Barnhart, 420 F.3d 1002, 1003 (9th Cir. 2005) (quoting Schneider v. Comm’r of Soc. Sec. Admin., 223 F.3d 968, 974 (9th Cir. 2000)). Although the ALJ must assist the applicant in developing a record, the applicant bears the burden of proof during the first four steps. Tackett v. Apfel, 180 F.3d 1094, 1098 & n.3 (9th Cir. 1999). If the fifth step is reached, however, the burden shifts to the Commissioner. Id. at 1098. The steps for evaluating a claim are as follows:

Step 1. Is the claimant presently working in a substantially gainful activity? If so, then the claimant is “not disabled” within the meaning of the Social Security Act and is not entitled to disability insurance benefits. If the claimant is not working in a substantially gainful activity, then the claimant’s case cannot be resolved at step one and the evaluation proceeds to step two.

Step 2. Is the claimant’s impairment severe? If not, then the claimant is “not disabled” and is not entitled to disability insurance benefits. If the claimant’s impairment is severe, then the claimant’s case cannot be resolved at step two and the evaluation proceeds to step three.

Step 3. Does the impairment “meet or equal” one of a list of specific impairments described in the regulations? If so, the claimant is “disabled” and therefore entitled to disability insurance benefits. If the claimant’s impairment neither meets nor equals one of the impairments listed in the regulations, then the claimant’s case cannot be resolved at step three and the evaluation proceeds to step four.

Step 4. Is the claimant able to do any work that he or she has done in the

1 past? If so, then the claimant is “not disabled” and is not entitled to disability
 2 insurance benefits. If the claimant cannot do any work he or she did in the past, then
 3 the claimant’s case cannot be resolved at step four and the evaluation proceeds to the
 4 fifth and final step.

5 **Step 5.** Is the claimant able to do any other work? If not, then the claimant is
 6 “disabled” and therefore entitled to disability insurance benefits. If the claimant is
 7 able to do other work, then the Commissioner must establish that there are a
 8 significant number of jobs in the national economy that claimant can do. There are
 9 two ways for the Commissioner to meet the burden of showing that there is other
 10 work in “significant numbers” in the national economy that claimant can do: (1) by
 11 the testimony of a vocational expert, or (2) by reference to the Medical-Vocational
 12 Guidelines at 20 C.F.R. pt. 404, subpt. P, app. 2. If the Commissioner meets this
 13 burden, the claimant is “not disabled” and therefore not entitled to disability
 14 insurance benefits. If the Commissioner cannot meet this burden, then the claimant is
 15 “disabled” and therefore entitled to disability benefits.

16 Id. at 1098-99 (footnotes and citations omitted); see also Bustamante v. Massanari, 262 F.3d 949,
 17 954 (9th Cir. 2001) (giving an abbreviated version of the five steps).

18 Section 405(g) permits this Court to enter a judgment affirming, modifying, or reversing the
 19 Commissioner’s decision. 42 U.S.C.A. § 405(g). The matter may also be remanded to the Social
 20 Security Administration for further proceedings. Id. After a case is remanded and an additional
 21 hearing is held, the Commissioner may modify or affirm the original findings of fact or the decision.
 22 Id.

23 “If the evidence can reasonably support either affirming or reversing the Secretary’s
 24 conclusion, the court may not substitute its judgment for that of the Secretary.” Flaten v. Sec’y
 25 Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995). The Court must uphold the denial of
 26 benefits if the evidence is susceptible to more than one rational interpretation, one of which supports
 27 the ALJ’s decision. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).

28 **2. Analysis**

Plaintiff contends the ALJ committed legal error in ignoring the opinions of Dr. Khamishon,
 Plaintiff’s treating physician, Dr. Stover, Plaintiff’s examining physician, and Dr. Bolter, a medical
 expert. (Doc. 14-1 at 8-11.) Defendant contends the ALJ properly evaluated the medical evidence
 and gave greatest weight to Dr. Bolton’s opinion, the testifying medical expert. (Doc. 15-1 at 6-9.)
 For the sake of clarity, the Court will address each opinion separately.

a. Disregarding Findings of Treating Physician

Plaintiff contends the ALJ committed legal error in failing to consider Plaintiff’s treating

1 physician, Dr. Khamishon's, opinion in his decision. (Doc. 14-1 at 9-10.) Specifically, Plaintiff
2 contends the ALJ should have addressed Dr. Khamishon's conclusion that during one of her
3 migraine headaches, Plaintiff would be precluded from even basic work activities and would have to
4 take a break from the workplace. Id. Additionally, Plaintiff contends the ALJ should have
5 considered Dr. Khamishon's conclusion that Plaintiff would be absent from work more than four
6 times a month as a result of her impairment. Id. at 10.

7 Defendant contends Plaintiff incorrectly labels Dr. Khamishon as a treating physician. (Doc.
8 15-1 at 7-8.) Defendant contends the proper classification of Dr. Khamishon as an examining
9 physician reveals the ALJ's analysis was entirely proper. Id.

10 "Cases in [the Ninth Circuit] distinguish among the opinions of three types of physicians:
11 (1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the
12 claimant (examining physicians); and (3) those who neither examine nor treat the claimant
13 (nonexamining physicians)." Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). The opinions of
14 treating doctors are generally given more weight than the opinions of nontreating doctors. Id. (citing
15 Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987)). The opinion of an examining doctor is
16 entitled to greater weight than that of a nonexamining doctor. Id. (citing Pitzer v. Sullivan, 908 F.2d
17 502, 506 (9th Cir. 1990); Gallant v. Heckler, 753 F.2d 1450 (9th Cir. 1984)). However, "[t]he
18 findings of a nontreating, nonexamining physician can amount to substantial evidence, so long as
19 other evidence in the record supports those findings." Saelee v. Chater, 94 F.3d 520, 522 (9th Cir.
20 1996).

21 A treating physician is one who has provided treatment to a claimant on more than one
22 occasion. It is not practical to draw a bright line between treating and nontreating physicians;
23 instead the distinction is based upon the duration of the relationship and the frequency and nature of
24 the contact. Le v. Astrue, 529 F.3d 1200, 1201 (9th Cir. 2008). A physician qualifies as a treating
25 source if the claimant sees her with a frequency consistent with accepted medical practice for the
26 type of treatment and/or evaluation required for the medical condition. Benton v. Barnhart, 331 F.3d
27 1030, 1036 (9th Cir. 2003).

28 According to 20 C.F.R. § 404.1527(d), a treating physician's opinion must be accorded

controlling weight if it is “well supported by medically acceptable clinical and laboratory diagnostic techniques and . . . not inconsistent with the other substantial evidence in [the] case record” 20 C.F.R. § 404.1527(d)(2) (2009). If the treating physician’s opinion is not given controlling weight, the following factors are applied in determining what weight to give the opinion: (1) the length of the treatment relationship and the frequency of examination, (2) the nature and extent of the treatment relationship, (3) the supportability of the opinion, (4) the consistency of the opinion with the record as a whole, (5) the specialization of the treating physician, and (6) any other factors brought to the attention of the ALJ which tend to support or contradict the opinion. Id. § 404.1527(d)(2)(i)-(ii), (d)(3)-(6).

Opinions of treating physicians may only be rejected under certain circumstances. See Batson v. Comm’r of Soc. Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004). “[W]here the treating doctor’s opinion is not contradicted by another doctor, it may be rejected only for ‘clear and convincing’ reasons.” Lester, 81 F.3d at 830 (citing Baxter v. Sullivan, 923 F.2d 1391, 1396 (9th Cir. 1991)); see also Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002). “Even if the treating doctor’s opinion is contradicted by another doctor, the Commissioner may not reject this opinion without providing ‘specific and legitimate reasons’ supported by substantial evidence in the record” Lester, 81 F.3d at 830 (citing Murray v. Heckler, 722 F.2d 499, 502 (9th Cir. 1983)). And like the opinion of a treating doctor, the opinion of an examining doctor, even if contradicted by another doctor, can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record. Lester, 81 F.3d at 830-31 (citing Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir.1995)).

Here the ALJ neither addressed nor explained the weight given to Plaintiff’s treating neurologist, Dr. Khamishon’s opinion.⁴ The record shows Dr. Khamishon saw Plaintiff on January 28, 2009 for a neurological consultation, and again on February 4, 2009 for testing. (AR 408-411.)

⁴ The Court also notes the ALJ fails to mention Dr. Friedman and Dr. Hamrang, both of whom were Plaintiff’s treating physicians. Because Plaintiff does not mention these physicians in her Motion for Summary Judgment, the Court shall not address the ALJ’s failure to consider these physicians’ opinions.

1 After a neurological evaluation, Dr. Khamishon diagnosed Plaintiff with residual posttraumatic head
 2 syndrome. (AR 411.) He proscribed Amitriptyline to help her sleep and requested an MRI and
 3 EEG. (AR 224, 411.) Upon Dr. Khamishon's request, on February 6, 2009, Plaintiff received an
 4 MRI in which Dr. Louis Mass, the reading radiologist, found a mild nonspecific anterior frontal
 5 subcortical T2 weighted signaled hyperintensity with some dropout on the right on the gradient echo
 6 sequence. (AR 406.) On May 26, 2009, Dr. Khamishon completed a residual functional capacity
 7 questionnaire. (AR 413-422.) Dr. Khamishon recorded Plaintiff's prognosis as guarded. (AR 416.)
 8 He found that while Plaintiff has a headache, she would generally be precluded from performing
 9 even basic work activities. (*Id.*) He also found she would be able to tolerate moderate stress in her
 10 work environment. (*Id.*) Dr. Khamishon estimated Plaintiff would be absent from work more than
 11 four times a month as a result of her impairments. (AR 417.)

12 Contrary to Defendant's assertion, based on the above record of treatment, Dr. Khamishon
 13 qualifies as a treating physician. Dr. Khamishon's initial neurological evaluation of Plaintiff,
 14 testing, diagnosis, prescription of medication, and referring Plaintiff to receive an MRI is consistent
 15 with the accepted medical practice for the type of treatment and/or evaluation required for Plaintiff's
 16 neurological condition. Benton v. Barnhart, 331 F.3d 1030, 1036 (9th Cir. 2003). Therefore, the
 17 ALJ's failure to give specific, legitimate reasons for disregarding Dr. Khamishon's, a treating
 18 physician's opinion, is legal error. See Batson, 359 F.3d at 1195. "[I]f the ALJ rejects significant
 19 probative evidence, he must explain why." Lusardi v. Astrue, No. 08-35712, 2009 WL 3497739, at
 20 *2. However, even if Dr. Khamishon is considered an examining physician rather than a treating
 21 physician, the ALJ still committed legal error in failing to provide specific and legitimate reasons
 22 that are supported by substantial evidence in the record for rejecting Dr. Khamishon's opinion.
 23 Lester, 81 F.3d at 830-31.

24 For these reasons, the Court RECOMMENDS Plaintiff's Motion for Summary Judgment as
 25 relates to Dr. Khamishon be **GRANTED** and Defendant's Cross Motion for Summary Judgment as
 26 relates to Dr. Khamishon be **DENIED**. Further, the Court RECOMMENDS a **REMAND** is in order
 27 to address Dr. Khamishon's opinions and limitations he imposed on Plaintiff.

28 **b. Disregarding Findings of Examining Physician**

1 Plaintiff contends the ALJ committed legal error in disregarding Dr. Stover's, an examining
 2 physician's,⁵ opinion that if Plaintiff has an intense headache, it would be difficult for her to perform
 3 many tasks with the accompanying pain. (Doc .14-1 at 8-9.)

4 Defendant contends the ALJ properly considered Dr. Stover's conclusion that Plaintiff would
 5 have no physical limitations. (Doc. 15-1 at 7.)

6 As stated above, the opinion of an examining doctor, even if contradicted by another doctor,
 7 can only be rejected for specific and legitimate reasons that are supported by substantial evidence in
 8 the record. Lester, 81 F.3d at 830-31 (citing Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir.1995)).

9 Here, the ALJ adopted Dr. Stover's opinion that Plaintiff would have no physical limitations.
 10 In his decision, the ALJ noted Dr. Stover reported Plaintiff had signs and symptoms consistent with
 11 migraine tension complex issues and the psychometric testing was indicative of a mild learning
 12 disorder and mild recent memory. (AR 12.) Further, the ALJ noted Dr. Stover concluded Plaintiff
 13 "is not restricted in standing, walking, sitting, lifting, or carrying, pushing, or pulling. Additionally,
 14 she is not restricted with any postural functions such as climbing, balancing, stooping, kneeling, or
 15 crouching; and no manipulative limitations as to reaching, handling, or fingering." (AR 12.)
 16 However, the ALJ did not address Dr. Stover's statement that "[i]f [Plaintiff] has [an] intense
 17 headache, it would be difficult for her to perform many of these tasks with the accompanying pain."
 18 (AR 361.) Also, Dr. Bolter, a medical expert, and Dr. Khamishon, a treating physician, made
 19 similar statements with regard to Plaintiff's potential inability to perform tasks while experiencing a
 20 migraine. (AR 13, 416.) In disregarding Dr. Stover's, Dr. Bolter's and Dr. Khamishon's opinions, it
 21 is not apparent whether the ALJ accounted for Plaintiff's migraines in his RFC determination.

22 Thus, the Court finds the ALJ committed legal error by failing to provide specific and
 23 legitimate reasons for disregarding opinion evidence of Plaintiff's examining physician, Dr. Stover.
 24 Lester, 81 F.3d at 830-31. For these reasons, the Court RECOMMENDS Plaintiff's Motion for
 25 Summary Judgment as relates to Dr. Stover be **GRANTED** and Defendant's Cross Motion for
 26 Summary Judgment as relates to Dr. Stover be **DENIED**. Further, the Court RECOMMENDS a
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28 ⁵ From Plaintiff's Motion for Summary, it seems Plaintiff characterizes Dr. Stover as a state
 agency medical expert. However, a review of the record indicates Dr. Stover is an examining physician.

1 **REMAND** is in order to address Dr. Stover's opinions and limitations he imposed on Plaintiff.

2 **c. Disregarding Findings of Medical Expert Witness**

3 Plaintiff contends the ALJ committed legal error in disregarding Dr. Bolter's conclusion that
4 Plaintiff would be limited to a low stress job and finding that Plaintiff can tolerate a moderate level
5 of job-related stress. (Doc. 14-1 at 8-9.)

6 Defendant contends the ALJ gave greatest weight to testifying medical expert Dr. Bolter's
7 opinion about Plaintiff's RFC and found Plaintiff could handle simple, one or two-step tasks with
8 moderate stress. (Doc. 15-1 at 6.) First, Defendant contends Dr. Bolter did not state Plaintiff was
9 limited to low-stress work. Id. at 7. Further, Defendant contends regardless of whether the ALJ did
10 not fully credit Dr. Bolter's opinion, it is not necessary to agree with everything an expert witness
11 says in order to hold that his testimony contains substantial evidence. Id.

12 ALJ's are not bound by any findings made by state agency medical or psychological
13 consultants. 20 C.F.R. § 404.1527. Because reviewing physicians do not consider subjective
14 factors, such as pain and fatigue, in determining the claimant's work ability, courts have found their
15 conclusions to be of limited value. Penny v. Sullivan, 2 F.3d 953, 957 (9th Cir. 1993.) However,
16 state agency medical consultants and other program physicians are highly qualified physicians who
17 are also experts in social security disability evaluation. (Id.) Accordingly, "[f]indings of fact made
18 by State agency medical and psychological consultants...regarding the nature and severity of an
19 individual's impairment(s) must be treated as expert opinion evidence of nonexamining sources at
20 the administrative law judge and Appeal Council levels of administrative review." Social Security
21 Ruling § 96-6p. Further "administrative law judges and the Appeal Council may not ignore these
22 opinions and must explain the weight given to these opinions in their decisions." (Id.)

23 Here, the ALJ neither addressed nor explained the weight given to Dr. Bolter's opinion
24 regarding the level of job-related stress Plaintiff had the capacity to experience. Dr. Bolter, a
25 medical expert, testified that with regard to concentration, persistence, and pace, Plaintiff should be:

26 [R]estricted to simple, repetitive tasks or contact. If she tried to do more than that,
27 even though Dr. Engelhorn says she can do complex tasks, I just can't find that supported
28 anywhere else in the record. The best we could have would be simple tasks. And the
migraine is going to play a part in this, but those are always difficult to evaluate except from
testimony. The neurologist says she does have migraines. She's being treated for it. It's
difficult to place that into the total picture. But it's going to cause problems. Again, some

1 types of job[s] where *low* stress, so that they would not precipitate a migraine. [sic]
2 (AR 42) (emphasis added). However, the ALJ found Plaintiff has an RFC to perform a full range of
3 work at all exertional levels with non-exertional limitations, including she can understand, remember
4 and carry out only simple, one or two-step instructions, she can relate and interact with supervisors,
5 co-workers and the general public, she can maintain concentration and attention for simple,
6 repetitive works, and she can tolerate a *moderate* level of job-related stress. (AR 11-13) (emphasis
7 added). Although the ALJ did partially consider Dr. Bolton's opinion about Plaintiff's RFC, the ALJ
8 failed to explain the weight given to Dr. Bolter's statements about the job-related stress levels and
9 why he disagreed with Dr. Bolter. Social Security Ruling § 96-6p.

10 Thus, the Court finds the ALJ committed legal error by failing to explain the weight given to
11 Dr. Bolter's statements about job-related stress levels. Accordingly, the Court RECOMMENDS
12 Plaintiff's Motion for Summary Judgment as relates to Dr. Bolter be **GRANTED** and Defendant's
13 Cross Motion for Summary Judgment as relates to Dr. Bolter be **DENIED**. Further, the Court
14 RECOMMENDS a **REMAND** is in order to address Dr. Bolter's opinions and limitations he
15 imposed on Plaintiff.

16 V. CONCLUSION

17 After a thorough review of the record in this matter and based on the foregoing analysis, this
18 Court RECOMMENDS Plaintiff's Motion for Summary Judgment be **GRANTED**, Defendant's
19 Cross Motion for Summary Judgment be **DENIED**, and the case be **REMANDED** for further
20 proceedings.

21 This Report and Recommendation of the undersigned Magistrate Judge is submitted to the
22 United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. §
23 636(b)(1) (2007) and Local Rule 72.1(d).

24 IT IS HEREBY ORDERED that **no later than February 25, 2011**, any party may file and
25 serve written objections with the Court and serve a copy on all parties. The document should be
26 captioned "Objections to Report and Recommendation."

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2 IT IS FURTHER ORDERED that any reply to the objections shall be filed and served **no**
3 **later than ten days** after being served with the objections. The parties are advised that failure to
4 file objections within the specified time may waive the right to raise those objections on appeal of
5 the Court's order. Martinez v. Y1st, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

6 **IT IS SO ORDERED.**

7 DATED: February 11, 2011

8 
9 LOUISA S PORTER
10 United States Magistrate Judge

11 cc: The Honorable Janis L. Sammartino
12 all parties
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